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SUPREME COURT, U. S.

No. 73-422

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In the Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH A. D'AMBRA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners brought this suit under the Federal Tort Claims Act to recover damages for the wrongful death of their four-year old son who was struck and killed by a U.S. mail truck in North Providence, Rhode Island. Pursuant to the provisions of 28 U.S.C. 2674, the district court applied the law of the state where the accident occurred to determine the government's liability and the measure of petitioners' damages. After finding the government liable under the statute, the district court turned to the question of damages.

Under the Rhode Island Wrongful Death Act (Pet. App. A21-A22, n. 2), damages are not computed on the basis of the actual pecuniary loss sustained by the survivors of the decedent. Instead, damages are measured by the full value of the decedent's life—*i.e.*, the gross amount of the decedent's projected income over his remaining life expectancy less estimated *personal*

expenses (but not expenses that would have been incurred for his dependents), reduced to present value. The damages thus computed are awarded to the decedent's next of kin in accordance with the state's intestacy laws. On the basis of that formula, the district court awarded $118,800 to petitioners, the decedent's parents, who took as next of kin (Pet. App. A14-A35).

The court of appeals affirmed on the question of liability but vacated the award of damages and remanded for a recomputation of compensatory damages (Pet. App. A1-A13). The court held that the measure of damages prescribed by the Rhode Island Act bore no relation to the actual loss sustained by petitioners, and therefore was "punitive" within the meaning of 28 U.S.C. 2674.[1] It concluded (Pet. App. A2) that Congress had not

> intended in a wrongful death case to accept liability over and above compensating the survivors to the extent of their loss; viz., * * * to pay an additional sum computed on some concept of the ultimate value of the estate, which, demonstrably, the survivors would never have received.

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[1] That section provides in pertinent part:

§2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable * * * for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides * * * for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

The court remanded the case for a redetermination of damages based solely on "the loss [to petitioners] of the companionship and society of the infant victim" (Pet. App. A12).

The decision of the court of appeals is correct, and further review is not warranted. Damages recoverable under the Tort Claims Act are limited to compensatory damages—amounts which measure the loss to the plaintiffs resulting from the death of the decedent. As this Court stated in *Massachusetts Bonding & Insurance Co.* v. *United States,* 352 U.S. 128, 132-133, "[t]he standard under the Tort Claims Act is 'compensatory', *i.e.,* 'measured by the pecuniary injuries' resulting from the death." The court below properly held that the measure of damages prescribed by Rhode Island's Wrongful Death Act—which, as petitioners acknowledge (Pet. 5), bears no relation to the pecuniary injury suffered by the survivors—is "punitive" within the meaning of the Tort Claims Act.

There is no conflict among the courts of appeals on this issue. In *Hartz* v. *United States,* 415 F. 2d 259 (C.A. 5), the only other court of appeals to have addressed this question refused to apply the damages provisions of the Georgia Wrongful Death Act, because that statute, like the Rhode Island Act, fails to limit recovery to the loss sustained by the survivors and therefore permits recovery of punitive damages within the meaning of the Tort Claims Act. In the other decisions cited by petitioners, *United States* v. *Brooks,* 176 F. 2d 482 (C.A. 4), and *Rosenal* v. *United States,* 94 F. Supp. 1004 (W.D. Pa.), affirmed, 189 F. 2d 969 (C.A. 3), the question presented here was neither raised by the parties nor addressed by the courts.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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